UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 04-15656	)	
	)	
SEAN ELLIOT SHUMAKER	)	
JENNIFER RENEE SHUMAKER	)	
	)	
Debtors	)	
	)	
	)	
JOHN SHORT	)	
ANNETTE SHORT	)	
	)	
Plaintiffs	)	
	)	
vs.	)	PROC. NO. 05-1055
	)	
SEAN ELLIOT SHUMAKER	)	
JENNIFER RENEE SHUMAKER	)	
	)	
Defendants	)	

DECISION

At Fort Wayne, Indiana on January 4, 2006.

This adversary proceeding arises out of a contract between the plaintiffs, John and Annette Short, and the defendant/debtor, Sean Shumaker,[1] who was doing business as Superior Builders, by which he agreed to build a garage. The issue before the court is not whether the defendant breached that contract – he clearly did – or whether the plaintiffs have been damaged as a result – they clearly have been. Rather, the issue is whether the obligation arising out of that breach constitutes a non-dischargeable debt under § 523(a)(2)(A) of the United States Bankruptcy Code. This portion of the Bankruptcy Code excepts from the scope of a debtor's discharge debts "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by – false

[1]The claims against Jennifer Shumaker were voluntarily dismissed at trial.

pretenses, a false representation, or actual fraud . . . ." 11 U.S.C. § 523(a)(2)(A). The matter is before the court following trial of that issue.

Civil (non-criminal) law recognizes two broad categories of law which govern the obligations of one person to another – contract and tort. Although they may, at times, intersect, in general these two bodies of law are separate and distinct from one another, each having its own requirements for such things as the elements of proof and the measure of damages. Despite this, there is often a tendency to blur the line which separates contract from tort and to characterize one type of claim as the other. This frequently occurs when litigants to try to transform what is really a claim for breach of contract into some type of fraud. Sometimes this is done in an effort to avoid limitations on damages associated with contract but not tort claims. See e.g., Cerabio LLC v Wright Medical Technology, Inc., 410 F.3d 981 (7th Cir. 2005); All-Tech Telecom, Inc. v Amway Corp. 174 F.3d 863 (7th Cir. 1999). In this court, the motivation to do so comes from the fact that debts arising out of a breach of contract are dischargeable while those which arise out of fraud are not. 11 U.S.C. § 523(a)(2). Thus, creditors who want to preserve the opportunity to collect the amount due them from a debtor have every incentive to try to recharacterize what is really nothing more than a "simple" breach of contract into some type of fraud.

The failure to perform a contract is not sufficient to except a debt from the scope of a bankruptcy discharge. In re Barr, 194 B.R. 1009, 1017-18 (Bankr. N.D. Ill. 1996); In re Guy, 101 B.R. 961, 978-979 (Bankr. N.D. Ind. 1988); In re Cortese, 77 B.R. 961 (Bankr. S.D. Fla. 1987). Indeed, even an intentional breach of contract will not create a non-dischargeable debt, unless the breach is accompanied by conduct that is also tortious. In re Williams, 337 F.3d 504, 509-10 (5th Cir. 2003); Petralia v. Jerich, 238 F.3d 1202, 1205-06 (9th Cir. 2001); In re Riso, 978 F.2d 1151,

1154 (9th Cir. 1992). See also, In re Lazzara, 287 B.R. 714, 722 (Bankr. N.D. Ill. 2002)(applying §523(a)(6)). To be non-dischargeable under § 523(a)(2), a debt must have been obtained by fraud, and fraud requires more than a breach of promise. United States of America ex. rel. Main v. Oakland City Univ., 426 F.3d 914, 917 (7th Cir. 2005). The creditor needs to prove that "fraud existed at the inception of the debt," In re Gennaro, 12 B.R. 4, 6 (Bankr. W.D. Pa. 1981), or that it was fraudulently induced to enter into the underlying contract, such as where the debtor entered into a contract with no intention of performing it. Barr, 194 B.R. at 1017-18; Guy, 101 B.R. at 978-79. See also, Main v. Oakland City University, 426 F.3d at 917; Perlman v. Zell, 185 F.3d 850, 852 (7th Cir.1999). Plaintiffs bear the burden of proving this fraud by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 287-88, 111 S. Ct. 654 (1991). They have failed to meet that burden here.

The facts before the court and evidence presented to it demonstrate nothing more than a breach of contract. Admittedly, that breach was relatively severe, but a breach of contract does not become a claim for fraud just because the defendant breached the contract in a big way rather than in lots of little ways. The extent of the defendant's breach implicates the damages the plaintiff is entitled to recover, not the basis for imposing liability.

Defendant's obligation to the plaintiffs is a dischargeable debt. Judgment will be entered accordingly.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court